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FEDERAL COMMUNICATIONS COMMISSION
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Gary L. Phillips
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EX PARTE OR LATE FILED

November 4, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Street Lobby - TW-A325
Washington, DC 20554

Re: Ex Parte Presentation
CCB/CPD 97-30 and
CC Docket 96-98

Dear Ms. Salas:

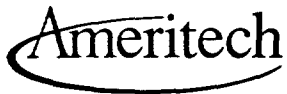
Attached is a copy of a letter sent to Larry Strickling, Chief of the Common Carrier Bureau. Please enter it into the record of the above-referenced dockets.

Sincerely,

Gary L. Phillips

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November 4, 1998

Gary L. Phillips
Director of Legal Affairs
Washington Office

Mr. Larry Strickling, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 500
Washington, DC 20554

Re: **Ex Parte Presentation**
CCB/CPD 97-30 and
CC Docket 96-98

Dear Mr. Strickling:

Courts interpret contracts every day, but no one would dream of asking a court to interpret a contract without looking at it. Time Warner Telecom (TWTC), however, in a letter filed on October 30, 1998, in the above-referenced dockets, asks the Commission to interpret simultaneously hundreds of Section 252 interconnection agreements that are not before the Commission and most of which the Commission has never seen.

The Commission must decline TWTC's invitation to lawlessness. First, the Commission does not have the authority to interpret these interconnection agreements. That is a matter that is solely within the prerogative of the states and federal district courts.

Second, and equally important, even if the Commission had the authority to construe these agreements, it is in no position to do so. Few, if any, of the interconnection agreements at issue were actually filed at the Commission. Thus the Commission can only speculate as to what they might or might not say. For the Commission even to opine in a non-binding fashion as to the possible meaning of hundreds of contracts that are not before it would be the ultimate in arbitrary and capricious agency action. That kind of gratuitous speculation has no place in this agency's decisions.

Mr. Larry Strickling
November 4, 1998
Page 2

Because the Commission thus has no basis for any conclusion - binding or not - as to the meaning of contracts not before it, it would be appropriate for the Commission to make clear that its jurisdictional determination in this proceeding is not necessarily dispositive of any contract issues. To this end, Ameritech proposes the following language:

The Commission's rulings do not necessarily imply that any particular State commission was wrong when it interpreted a particular interconnection agreement to require the payment of reciprocal compensation on internet traffic. The words of the agreement, construed in light of all applicable principles of contract interpretation and in light of this Commission's rulings, to the extent they are pertinent, may or may not impose such a requirement. But it is for State commissions and the courts, not this Commission, to make that determination case by case.

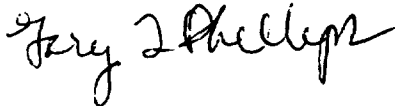
The Commission has no basis for saying anything more than this, however, and it should refrain from doing so.

Ameritech is aware that this is a hotly contested proceeding (as are a number of other proceedings the Commission has been called upon to decide in recent years). That, however, hardly justifies a patently arbitrary excursion into matters over which the Commission has no authority and about which the Commission has no record. Political expediency may have its place, but it is no excuse for the Commission to issue pronouncements on contracts it has never seen or to invite state decisions that are unfaithful to basic principles of contract construction. The Commission should leave matters of contract interpretation to the states and the courts, where they have been held to reside.

Mr. Larry Strickling
November 4, 1998
Page 3

Attached hereto are responses to TWTC specific claims, including its claim that, without reciprocal compensation, CLECs would be uncompensated for ISP traffic.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Gary L. Phillips".

Gary L. Phillips
Director of Legal Affairs

cc: Kathryn Brown
Tom Power
Jim Casserly
Paul Gallant
Kevin Martin
Kyle Dixon
Jim Schlichting
Suzanne Tetreault
Tamara Preiss

AMERITECH RESPONSE TO TWTC CLAIMS

TWTC's request for a ruling that all interconnection agreements require the payment of reciprocal compensation on interstate ISP calls rests on four claims, each of which is badly flawed.

1. **TWTC Claim:** The Commission has "classified ISP as end users," and should therefore rule that "ISPs shall be treated as end users for all purposes". (TWTC insert at 1.)

Principal TWTC Error:

- The Commission ruled exactly the opposite last Friday. See Memorandum Opinion and Order in CC Docket No. 98-79, ¶ 22
2. **TWTC Claim:** All existing interconnection agreements should be construed to reflect an "industry practice" that calls to ISPs and other information service providers are local traffic (TWTC insert at 3.)

Principal TWTC Errors:

- TWTC's depiction of "industry practice" ignores fifty years of industry practice under which the boundaries of a communications are determined on an end-to-end basis, not to mention fifty years of FCC orders repeatedly characterizing ESP traffic as access traffic.
- In most states, the meaning of contract language must be determined first and foremost from the words the parties used; extrinsic evidence of meaning – such as industry practice – can be considered only when the words in the contract are ambiguous. This Commission, is in no position to address whether the contracts are ambiguous, because it does not have any interconnection agreements before it.

Ameritech's contracts illustrate how perilous it would be for the Commission to speculate on whether interconnection agreements are ambiguous. Some Ameritech interconnection agreements provide, "In the event of a conflict ... between ... this Agreement and the [1996] Act [which is defined to include the rules and regulations of this Commission], the provisions of the Act shall govern." The Commission was probably unaware

of this provision, although a court might well find it to be dispositive of the meaning of the contract.

- Even where evidence of the industry practice cited by TWTC would be allowed, it would be just one of many possible pieces of extrinsic evidence that might bear on the meaning of the contract. TWTC mistakenly assumes it is the only extrinsic evidence in every case.

3. TWTC Claim: All interconnection agreements must call for reciprocal compensation on ISP traffic because (i) otherwise, CLECs would be uncompensated for that traffic, (ii) it would not be reasonable for any CLEC to agree to such an arrangement, and (iii) contracts must be given a reasonable interpretation (TWTC insert at 3.)

Principal TWTC Errors:

- The “reasonable interpretation” rule comes into play only when the meaning of the contract is unclear on its face. With no interconnection agreements before it, the Commission has no way to determine whether this rule of construction even applies to any particular contract.
- The reasonable interpretation rule does not cut in TWTC’s favor even if it does apply.

Contrary to misleading CLEC arguments, CLECs would not be uncompensated for ISP traffic without reciprocal compensation. In fact, they would earn about the same as Ameritech on this traffic.¹

¹ In the vast majority of cases, CLECs use ISDN Prime Service to deliver circuit switched traffic to their ISP customers. The market rate for ISDN Prime Service ranges from \$200 to \$300 per line, depending on market conditions and the volume of lines purchased. Each of these lines contains 24 circuits, each of which typically serves 8 to 10 end user customers of the ISP. Thus, even without reciprocal compensation, CLECs earn approximately \$1 to \$1.50 from their ISP customers for each end user that the ISP serves.

Similarly, Ameritech earns, on average, just under \$.05 for each call it originates that is billed at local rates, including calls to ISPs. Thus, Ameritech earns approximately \$1.50 per month in “local” revenues from an end user that logs onto the internet once a day, every day.

What would be unreasonable would be for an ILEC, such as Ameritech, which earns about 5¢ per call, to agree to pay reciprocal compensation, at an average rate of 20 - 25¢ per call, on access traffic that is not reciprocal, but inherently one-way. This is especially true since ILECs, which serve the majority of end users, would have virtually no opportunity to take advantage of such a reciprocal compensation windfall.

What would also be unreasonable would be for a CLEC - intending for its agreement to provide for reciprocal compensation on Internet calls, but faced with fifty years of FCC orders and court decisions holding that the jurisdiction of traffic is measured end to end - to not take pains to spell out its intent unambiguously in its interconnection agreements.

4. TWTC Claim: Any agreement that excludes ISP traffic from reciprocal compensation is unlawfully discriminatory (TWTC insert pp. 3-1.)

Principal TWTC Error:

- TWTC mistakenly assumes that the ISP traffic that the Commission has just held is interstate traffic that terminates on distant websites is instead local traffic that terminates at the ISP's server. There is no unlawful discrimination in treating interstate traffic differently than local traffic.